RECORD
AND
BRIEFS

No. 15-457

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

PARTIES TO THE PROCEEDINGS

The sole petitioner here (defendant below) is Microsoft Corporation.

In addition to the plaintiff-respondent identified on the cover, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk were also named plaintiffs below. With the exception of Jesse Bernstein, who dismissed his appeal, these individuals are also respondents here.

RULE 29.6 STATEMENT

Microsoft Corporation, a publicly traded company, has no corporate parent, and no publicly held company has an ownership interest of more than ten percent.

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BRIEF FOR PETITIONER

Petitioner Microsoft Corporation respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit in No. 12-35946, and remand with instructions to dismiss the appeal.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (Pet. App. 1a) is published at 797 F.3d 607. The relevant order of the district court (Pet. App. 35a) is unpublished.

JURISDICTION

The Ninth Circuit issued its initial decision on March 18, 2015. The Ninth Circuit issued an amended opinion, simultaneously denying Microsoft's petition for rehearing en banc, on July 20, 2015. Pet. App. 1a, 5a. This Court granted certiorari on January 15, 2016. 136 S. Ct. ___. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States," and to certain "Controversies."

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

28 U.S.C. § 1292(e) provides: "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided under subsection (a), (b), (c), or (d)."

Federal Rule of Civil Procedure 23(f) provides in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."

STATEMENT OF THE CASE

This case presents an important jurisdictional issue concerning class action procedure in which the Ninth Circuit has departed from a broad consensus in other circuits. If accepted, the Ninth Circuit's holding would upend settled understandings concerning the final judgment rule and the appealabilty of class certification decisions. It would also thwart a carefully crafted federal rule of civil procedure this Court—with the input of the bench and bar and the approval of Congress—promulgated in 1998 to accommodate appeals from interlocutory class certification decisions.

A. Legal Background

Plaintiffs in putative class actions have long sought the right to take immediate appeals from orders denying class certification. In the 1960's and 1970's, federal courts sometimes allowed such appeals, developing what became known as the "death knell" doctrine. Under that doctrine, several circuits accepted mandatory jurisdiction under 28

U.S.C. § 1291 of appeals from orders denying class certification upon finding that the orders, if left unreviewed, would "end the lawsuit for all practical purposes." *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966). That is, if plaintiffs who had been denied class certification demonstrated that the value of their individual clams made it economically imprudent to litigate them on their own, these appellate courts deemed the denial orders to be "final"—and therefore appealable—decisions. *Id.*

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court put an end to that practice. In a unanimous opinion, this Court held that plaintiffs may not force an appellate court to hear an immediate appeal from an order denying class certification, even if they show the denial of class certification makes it "economically imprudent" for plaintiffs "to pursue [the] lawsuit to a final judgment and then seek appellate review of [the] adverse class determination." *Id.* at 469-70. Although allowing such appeals "may enhance the quality of justice afforded a few litigants," this Court determined that "this incremental benefit is outweighed" by the need to avoid piecemeal appeals and "potential waste of judicial resources." *Id.* at 473. The death-knell doctrine also operated unfairly "only in favor of plaintiffs," even though the class certification issue "will often be of critical importance to defendants as well." *Id.* at 476.

Two decades after *Livesay*, this Court promulgated Federal Rule of Civil Procedure 23(f). Enacted under this Court's authority to prescribe rules allowing interlocutory appeals not otherwise permitted by statute, *see* 28 U.S.C. § 1292(e), this

rule broadened the circumstances under which federal courts of appeals may "permit an appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f); *compare Livesay*, 437 U.S. at 466 & n.5, 474-75 (referencing prior rules governing the allowance of interlocutory appeals of such orders). But as the Advisory Committee stressed, courts of appeals retain "unfettered discretion" under Rule 23(f) to grant or deny requests for permission to appeal. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. Courts typically consider whether an order denying certification "confront[s] the plaintiff with a situation in which the only sure path to appellate review is by proceeding to judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." *Id.* But courts of appeals have the absolute authority to deny immediate review for any reason. *Id.*

This case presents the issue whether plaintiffs may now do what *Livesay* forbids and Rule 23(f) does not allow: force a federal court of appeals to hear an immediate appeal of an order denying class certification. The Ninth Circuit here held that plaintiffs may secure such a right to appeal, as long as they are willing to stipulate expressly to what was assumed in both *Livesay* and the proceedings leading to Rule 23(f)'s accommodation for death-knell scenarios: that, if unsuccessful on appeal, the named plaintiffs will not go forward on their individual claims. Such a voluntary stipulation, the Ninth Circuit held, transforms an otherwise "inherently interlocutory" order, *Livesay*, 437 U.S. at 470, into a final judgment adverse to the plaintiffs, which satisfies not only Section 1291 but Article III as well.

B. Facts And Proceedings Below

1. In 2005, petitioner Microsoft Corporation released the Xbox 360 console. Widely popular with video-game enthusiasts, the Xbox 360 became the first console of its generation to sell over ten million units in the United States. Among other things, the Xbox 360 spun game discs in its disc drive faster than its competition, creating "a better overall video-gaming experience." CA9 ER 219.[1]

But like any device, the Xbox 360 has limits. As with turntables that spin vinyl records, the Xbox 360 may scratch spinning game discs if moved too quickly in the wrong direction during operation. Microsoft therefore affixed a sticker on the front of each disc drive—covering the disc tray before first use—telling users in three languages: "Do not move console with disc in tray." The user instruction materials likewise warn users to "[r]emove discs before moving the console or tilting it between the horizontal and vertical positions" to avoid "damaging discs." CA9 ER 106, 273, 278.

Nothing in the Xbox 360 warranty insures users against the consequences if they move a device with a disc spinning inside. It promises only that, "under normal use and service," the Xbox 360 "will conform to the printed user instruction materials," which warn against moving the console. CA9 ER 544.

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[1] In 2013, Microsoft introduced a more advanced successor to the Xbox 360, known as Xbox One. Other companies in intervening years have released new models of their own gaming consoles.

2. In 2007—four years before this case was filed—seven Xbox 360 owners sued Microsoft in separate lawsuits, alleging "the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal components, resulting in scratched discs that are rendered permanently unplayable." Pet. App. 6a. Those plaintiffs sought unspecified damages both for the few game owners whose discs had been scratched and for *all* Xbox 360 owners, on the theory that the console's supposed propensity to malfunction reduced the value of *all* Xbox 360 consoles and breached both express and implied warranties.

The cases were consolidated in the U.S. District Court for the Western District of Washington. After the parties developed a full evidentiary record through sixteen months of active discovery, the district court denied class certification. It began by noting that "Plaintiffs have alleged a defect that actually manifests in fewer than one percent of the Xbox consoles sold." J.A. 22; *see also* Pet. App. 6a ("only 0.4% of Xbox users have reported disc scratching"). And evidence showed user accidents or misuse caused at least some of the scratched discs reported. *See* J.A. 22-23 (describing scenarios of user-caused scratched discs). "Whether each user's actions constituted misuse, and whether his or her use/misuse caused the damage, would present individual issues of fact for the jury." J.A. 23. Accordingly, the district court reasoned that "[t]he requirements of individual attention to each plaintiff on issues of law and fact make this case an inappropriate candidate for class-action resolution." J.A. 24.

The plaintiffs filed a petition in the Ninth Circuit seeking interlocutory review under Rule 23(f). They argued the class certification denial "constitute[d] the 'death knell' for this litigation" because their individual claims were too small to justify litigating on their own to final judgment. *Torres v. Microsoft Corp.*, Ninth Cir. No 09-80160, Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) [Dkt. 1] at 8.

The Ninth Circuit denied the petition, J.A. 25, and plaintiffs resolved their individual claims through an agreement with Microsoft. The district court then dismissed the cases with prejudice.

3. In 2011, the same lawyers as in the original consolidated litigation filed a new lawsuit—again in the U.S. District Court for the Western District of Washington—on behalf of respondents, a handful of Xbox 360 owners who did not join in the original action. Respondents pressed the same claims as their predecessors, and they likewise requested certification of a nationwide class consisting of all owners of Xbox 360 consoles, without regard to whether they ever experienced a scratched disc.[2] They argued the Ninth Circuit's intervening decision in *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010)—holding that proof of the manifestation of a defect is not a prerequisite to class certification, and the typicality requirement in

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[2] Respondents originally sought to certify a scratched-disc subclass as well. But they abandoned the scratched-disc subclass on appeal, Pltfs. CA9 Br. 18-20, recognizing the impossibility of proving on a class-wide basis that the console, as opposed to user behavior, caused any particular disc scratch.

Fed. R. Civ. P. 23 "can be satisfied despite different factual circumstances surrounding the manifestation of the [alleged] defect," *id.* at 1175—now allowed certification of their proposed class.

Microsoft replied that *Wolin* did not change the law relevant to this case. As a result, Microsoft maintained, the district court should show comity to the decision in the earlier case, which rested on the same allegations and evidence as this one. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011) ("[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."). Further, Microsoft explained, *Wolin* does not apply where, as here, only a minuscule fraction of the proposed class suffered any harm in the form of a manifestation of an alleged defect, and individual proof would be necessary to determine whether any particular user's console failed to conform to the printed user instructions and thus breached the warranty.

The district court struck respondents' class allegations. It found the reasoning in the first class certification denial (by a different judge) persuasive and that "nothing in *Wolin* undermine[d] [that] causation analysis." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1280 (W.D. Wash. 2012).

4. Invoking Rule 23(f), respondents asked for permission to appeal the district court's order striking their class allegations.[3] J.A. 108-09. As in

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[3] Courts agree that Rule 23(f) applies not only to orders denying motions for class certification but also to orders striking class allegations because the two are "functional equivalent[s]."

the previous case, respondents' counsel asserted that "[t]he small size of Plaintiffs' claims makes it economically irrational to bear the cost of litigating this case to final judgment," such that, unless reversed, "the district court's order effectively kills the case." J.A. 118.

The Ninth Circuit denied the petition. Pet. App. 10a.

5. Upon receipt of the Ninth Circuit's order, respondents chose not to prosecute their individual claims. Instead, they promptly moved the district court to dismiss their claims with prejudice. Respondents explained why they wanted such an order: "After the Court has entered a final judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations." J.A. 122-123.

Microsoft stipulated that the district court could grant respondents' motion to dismiss their claims, as they had the right to dismiss voluntarily under Fed. R. Civ. P. 41(a)(1)(A)(i). Pet. App. 36a. Microsoft made clear, however, it believed "Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal." *Id.*

Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 110 n.2 (4th Cir. 2012) (quoting *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002)); *see also United Airlines v. McDonald*, 432 U.S. 385, 387-93 (1977) (repeatedly characterizing order striking class allegations as a "denial of class certification").

The district court granted the dismissal with prejudice, "reserving to all parties their arguments as to the propriety of any appeal." Pet. App. 36a-37a.

6. The Ninth Circuit assumed jurisdiction over respondents' appeal and reversed. Relying on its decision months earlier in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), the court of appeals reasoned that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal" of a class certification denial. Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064). This is so, according to respondents' understanding of Ninth Circuit law, because reversal under these circumstances "revive[s]" the named plaintiffs' individual claims—meaning the voluntary dismissal is really only a *conditional* abandonment of the claims. BIO 16 n.4 (citing *Concha v. London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995)).

Microsoft argued at length that *Berger*'s tolerance for such a procedure is at odds with *Livesay* and Rule 23(f)'s conferral of unfettered discretion to allow or deny interlocutory appeals of class certification orders. As Microsoft put it, plaintiffs may not manufacture an immediate right to appeal simply by offering formal confirmation that, if upheld on appeal, the class certification denial would in fact sound the "death knell" of their claims. Def. CA9 Br. 4-16. But the Ninth Circuit responded simply that *Berger* controlled, refusing to question that prior holding—even though it never cited, let alone grappled with, *Livesay*. Pet. App. 11a-12a; *see also Berger*, 741 F.3d at 1065-66.

Turning to the class certification denial, the Ninth Circuit concluded the district court "abused its discretion when it struck the class action allegations." Pet. App. 19a. Relying on *Wolin*, the court of appeals held that Rule 23 allows class certification when plaintiffs characterize their claims as turning on "a common factual question—is there a defect?" and on whether that defect breaches a warranty. *Id.* 16a. Under this reasoning, it does not necessarily make any difference whether "the defect here may never manifest" or if it manifests for different users for different reasons. *Id.* 17a.

At the same time, the Ninth Circuit acknowledged that "Microsoft makes several arguments" in addition to the one adopted by the district court "to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a. The Ninth Circuit thus emphasized it was "express[ing] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a. Instead, it "suffice[d] for now to hold that . . . the district court misread *Wolin*" and to remand for further proceedings concerning the viability of respondents' proposed class. *Id.* 18a, 19a.

7. Microsoft sought rehearing en banc. It argued that the Ninth Circuit's holding allowing plaintiffs to create appellate jurisdiction over class certification denials by voluntarily dismissing their claims conflicted with prior circuit precedent. Specifically, in *Huey v. Teledyne*, 608 F.2d 1234 (9th Cir. 1979), the Ninth Circuit held, shortly after *Livesay*, that when "the denial of class certification cause[s a]

failure to prosecute" for death-knell reasons, the dismissal precludes appellate review of the denial of class certification. *Id.* at 1240. Microsoft also explained that the Ninth Circuit's rule conflicts with the law in all but one of the other circuits to have considered this issue. *See Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245 (3d Cir. 2013); *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99-100 (4th Cir. 2011); *Himler v. Comprehensive Care Corp.*, 993 F.2d 1537 (4th Cir. 1993) (unpublished opinion); *Chavez v. Ill. State Police*, 251 F.3d 612, 628-29 (7th Cir. 2001); *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800 (10th Cir. 1980); *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1326 (11th Cir. 1999).[4]

The court of appeals responded by amending its opinion to insert a footnote trying to harmonize its jurisdictional holding with *Huey*. Pet. App. 4a-5a, 12a n.4. But it denied the petition without further comment. *Id.* 5a.

8. This Court granted certiorari. 136 S. Ct. ____ (2016).

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[4] Only the Second Circuit has previously condoned the voluntary dismissal tactic. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990). But later Second Circuit opinions—including one by then-Judge Sotomayor—have suggested *Gary Plastic* might be infirm, *see Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999), and no other plaintiff in that circuit appears to have used the tactic. In the Ninth Circuit, by contrast, plaintiffs have started regularly deploying it. *See* Pet. 17 n.2 (collecting cases); Joe Van Acker, *Consumers Pulling a Fast One in Cymbalta Case, Eli Lilly Says*, Law360 (Oct. 14, 2015).

SUMMARY OF THE ARGUMENT

A federal court of appeals lacks jurisdiction to review an order denying class certification after the named plaintiffs dismiss their claims with prejudice. If—as respondents maintain on appeal—a reversal of the class certification decision would somehow bring the plaintiffs' dismissed claims back to life, then there is no "final" district court decision and no basis for an appeal under 28 U.S.C. § 1291. Alternatively, if, as the dismissal order indicates, respondents unconditionally abandoned their claims to create finality, then the case is moot under Article III.

I. Insofar as the Ninth Circuit held that reversal of the class certification order reinstates respondents' claims, their voluntary dismissal ploy simply resuscitates the death-knell doctrine this Court abolished in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The only procedural difference between the two scenarios is that respondents generated a dismissal order memorializing their decision to forego their individual claims if unsuccessful on appeal. But Section 1291 requires a practical, not technical, approach to finality. And if plaintiffs' claims will spring back to life upon a reversal having nothing to do with the merits of those claims, the dismissal order here is nothing more than meaningless formalism. Plaintiffs who invoked the death-knell doctrine likewise abandoned any ability to pursue their individual claims if unsuccessful on appeal. Undertaking that conditional risk was not enough to generate finality there; nor is it sufficient here.

Further, respondents' voluntary dismissal tactic presents all three jurisprudential pitfalls this Court identified in *Livesay*. First, the tactic virtually

guarantees piecemeal appellate review. Second, it disrupts the proper balance between district and appellate courts, under which the former perform a valuable winnowing function for the latter. Third, like the death-knell doctrine, the voluntary dismissal tactic gives plaintiffs an unfair advantage in class actions—giving them an option for immediate review of class certification decisions defendants lack, even though class certification decisions are of equally vital importance to all parties.

This Court's post-*Livesay* adoption of Fed. R. Civ. P. 23(f) confirms the impropriety of respondents' appeal. Rule 23(f) deals with the very situation respondents claimed to face here, giving courts of appeals the authority in death-knell scenarios to accept interlocutory appeals of class certification orders. But this power is wholly discretionary. Allowing plaintiffs to *force* appellate courts to review such orders whenever they are willing to gamble their individual claims on the appeal would strip courts of appeals of the discretion Rule 23(f) confers. More generally, it would thwart Congress's determination in 28 U.S.C. § 1292(e) that this Court's rulemaking process—not manipulation of Section 1291—is the proper way to manage the jurisdictional relationship between trial and appellate courts.

II. If, contrary to their belief that their claims would spring back to life upon reversal, respondents' voluntary dismissal actually generated a "final decision"—one where respondents' claims could not be revived even if the procedural order is reversed—then this case is moot. Article III's "case or controversy" requirement demands that plaintiffs maintain a "personal stake" throughout the pendency

of litigation. If an appellate court would be unable to affect the legal rights of the plaintiff, the case is moot. It has thus long been a "familiar rule that a plaintiff who has voluntarily dismissed his complaint may not [appeal from that dismissal]." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958).

The only circumstance in which a plaintiff's voluntary dismissal does not sacrifice Article III adversity is the unusual circumstance when a prior interlocutory order effectively decides the plaintiff's claim on the merits, rendering the dismissal nothing more than a formal embodiment of the plaintiff's loss and a ministerial step on the way to an inevitable appeal. But here, the opposite is true. The district court's order striking respondents' class allegations had no effect whatsoever on the merits of their claims.

Respondents have never contended a "case or controversy" exists based on any relationship they have to the proposed class they sought to represent, so they may not press that position now. In any event, any such argument would fail. When named plaintiffs' claims are mooted "without their consent," they may retain a personal stake in class certification sufficient to support an appeal from a denial of that request. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980). But here, respondents' claims became moot because they voluntarily abandoned them. Nothing deprived respondents of a full and fair opportunity to pursue class certification. So there is no basis for relaxing Article III's adversity requirement to find a case or controversy here.

ARGUMENT

I. Federal Appellate Courts Lack Jurisdiction Under 28 U.S.C. § 1291 To Review An Order Denying Class Certification After The Plaintiffs Dismiss Their Claims With Prejudice.

The voluntary dismissal tactic respondents employed here contravenes this Court's application of 28 U.S.C. § 1291 in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). If condoned, the tactic would also upend the discretionary review system for class certification decisions this Court promulgated in Fed. R. Civ. P. 23(f).

A. The Voluntary Dismissal Tactic Contravenes This Court's Decision In *Coopers & Lybrand v. Livesay*.

1. Except for narrow exceptions not relevant here, 28 U.S.C. § 1291 limits the jurisdiction of federal courts of appeals to "final decisions" of district courts. "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). "The final judgment rule also lessens the risk that appellate courts will render abstract rulings on questions of law presented in an insufficiently developed factual context. And it reduces the likelihood that appellate courts will devote time and energy to the resolution of issues that may prove to be immaterial to the ultimate disposition of the case." Br. for the United States at 10-11, *Midland Asphalt Corp. v. United States*, 489

U.S. 794 (1989) (No. 87-1905) (summarizing case law). Finally, the final judgment rule eliminates the "delays," *Catlin v. United States*, 324 U.S. 229, 234 (1945), caused by "costly and time-consuming [interlocutory] appeals," *Flanagan v. United States*, 465 U.S. 259, 264 (1984).

In *Livesay*, this Court applied these principles to assess the appealability of orders denying class certification. The named plaintiffs allegedly lost $2,650 due to the defendant's securities-law violations and sought to represent a class of similarly situated shareholders. Although the district court at first granted the plaintiffs' class certification motion, it later decertified the class. The Eighth Circuit then assumed jurisdiction over plaintiffs' interlocutory appeal, deeming the decertification order "final" because it "sound[ed] the 'death knell' of the action." *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1109 (8th Cir. 1977). That is, the court of appeals credited the plaintiffs' assertion "that they [would] not pursue their individual claim if the decertification order stands." *Id.* at 1110.

This Court reversed. Writing for a unanimous Court, Justice Stevens explained it makes no difference whether plaintiffs in a putative class action "will not pursue their individual claim[s] if the decertification order stands." *Id.* at 466 n.7. Indeed, the Court accepted that "refusal to certify a class" may sometimes "induce a plaintiff to abandon his individual claim." *Id.* at 470. But orders denying class certification are still "inherently interlocutory"; they are always subject to revision before final judgment. *Id.*; *see also* Fed. R. Civ. P. 23(c)(1)(C). Even if "allowing an immediate appeal from those

orders may enhance the quality of justice afforded a few litigants, . . . this incremental benefit is outweighed" by the "serious debilitating effect" mandatory appellate jurisdiction would have on the orderly administration of justice. *Id.* at 473; *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (elaborating this balancing). Accordingly, "the *only sure path* to appellate review" for plaintiffs denied class certification "is by proceeding to final judgment on the merits of [their] individual claim[s]," and, if they succeed, appealing the order denying class certification. Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment (emphasis added); *accord Livesay*, 437 U.S. at 469.

2. The Ninth Circuit's holding in this case flouts *Livesay*. In proceedings below, respondents declared the district court's refusal to certify a class was the "death knell" of their case. J.A. 118 (Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17). They then dismissed their claims for no reason other than "to appeal the [order] striking Plaintiff's class allegations" without a trial on their individual claims. Pet. App. 36a. And—critically—respondents contend that if they are successful on appeal, their now-dismissed individual claims will be "revived" on remand, BIO 16 n.4, placing them in precisely the same position they would have occupied if they had been allowed to pursue an interlocutory appeal, the individual claims had been stayed pending that appeal, and they then prevailed. This scheme simply resuscitates the discredited death-knell doctrine.

Respondents disagree. They protest that *Livesay* does not control here because (a) the district court formally entered a dismissal order embodying the

death knell respondents themselves rang and (b) they "risk[] los[ing] their claims" if they lose their bet to secure a reversal of the class certification denial on appeal. BIO 17-18, 21. But neither of these arguments differentiates this case from *Livesay*.

a. This Court "has long given" the concept of "finality" in Section 1291 a "practical rather than a technical construction." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). It is therefore vital to focus on the substance of what respondents ask for in this appeal, not simply on the formality that they stipulated to a dismissal with prejudice as a means of taking the appeal.

Respondents do not—and could not—argue on appeal that the district court erred in dismissing their claims with prejudice. That, after all, is exactly what respondents asked the district court to do. Pet. App. 36a-37a. Instead, respondents essentially ask the appellate system to "look through" the voluntary dismissal, *Ylst v. Nunnemaker*, 501 U.S. 797, 801-04 (1991), to enable them to "challenge[]" the district court's prior order "strik[ing] class claims." BIO 18; *see also* Pet. App. 36a. If that challenge succeeds, respondents urge that their claims spring back to life, even though the class certification decision had nothing to do with the merits of their claims.

Plaintiffs should not have the right to manufacture appellate jurisdiction in this manner. An order denying class certification is "inherently interlocutory" and, therefore, not subject to review before the named plaintiffs' substantive claims are litigated to conclusion on their merits. *Livesay*, 437 U.S. at 470. Simply boot-strapping a class

certification denial to an order voluntarily dismissing the plaintiffs' claims—while insisting upon the right to resume litigating those claims if successful on appeal—should not change that bedrock principle.

Put another way, respondents seek to create in civil procedure something akin to the process provided in Fed. R. Crim. P. 11(a)(2). That rule allows criminal defendants to enter "conditional" guilty pleas while retaining the right to appeal adverse pretrial orders, such as orders denying motions to suppress. But one of the reasons Criminal Rule 11(a)(2) was created is because a conditional plea—inasmuch as it allows defendants to withdraw their prior consent to judgment if successful on appeal—"does not have complete finality." Fed. R. Crim. P. 11 advisory committee's note to 1983 amendment; *see also State v. Dorr*, 184 N.W.2d 673, 674 (Iowa 1971) (explaining that an appeal pursuant to a conditional plea is really an "interlocutory appeal"). And the civil rules contain no "conditional dismissal" counterpart to Criminal Rule 11(a)(2).[5]

Finally, just as with the death-knell doctrine, there would be no way to tolerate the voluntary dismissal tactic in the context of this case without

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[5] Even if they did, it would not help respondents. A criminal defendant who consents to a conditional judgment against him retains a right to appeal a pretrial order only if that right is reserved in writing "with the consent of the court and the government." Fed. R. Crim. P. 11(a)(2). Respondents obtained no consent here. To the contrary, Microsoft told them and the district court, "Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal." Pet. App. 36a.

enabling further incursions on Section 1291's final judgment rule. This Court noted in *Livesay* that Section 1291 applies to class certification orders the same way it applies to other pretrial orders. 437 U.S. at 470, 474. Consequently, "if the 'death knell' doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* at 470.

So too with the voluntary dismissal tactic. If courts "were to allow such a procedural sleight-of-hand to bring about finality," there would be "nothing to prevent [plaintiffs] from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-46 (3d Cir. 2013). This type of onslaught is exactly what Section 1291 and *Livesay* have long been designed to prevent.

b. The "risk" respondents claim to be taking by insisting on an immediate appeal does not separate this case from *Livesay* either. The very foundation of the death-knell doctrine was a requirement that plaintiffs prove "they would not pursue their claims individually" absent class certification. *Livesay*, 437 U.S. at 466; *see also* Resp. Br. 16, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (Nos. 76-1836 & 76-1837) (stressing that the plaintiffs "will have no opportunity to appeal at a later date because they

cannot proceed on their individual claim").[6] And this Court in *Livesay* explicitly took this "assumption" as a given. 437 U.S. at 470. Practically speaking, therefore, respondents remain in the identical position as the plaintiffs in *Livesay*.

Indeed, the most respondents can say as a result of the dismissal order they procured is that "[i]f [they] had failed to convince the court of appeals to reverse the district court's striking of the class claims, [they] would have lost [their] individual claims permanently." BIO 21. But plaintiffs under the death-knell doctrine put themselves in the same position. When a court of appeals accepted a plaintiff's death-knell argument but affirmed the denial of class certification, the rule of judicial estoppel—which "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase," *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000))—would have barred the plaintiff from going forward on his individual claims just the same. Respondents' willingness to stipulate to this bargain before appealing is nothing more than meaningless formalism. *See Bowe v. First of Denver Mortg. Inv.*, 613 F.2d 798, 800 (10th Cir. 1980).

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[6] In the first opinion to accept the death-knell doctrine, the Second Circuit put it this way: "The alternatives are to appeal now or to end the lawsuit for all practical purposes. [The] order [denying class certification] if unreviewed, will put an end to the action." *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966).

Even the Ninth Circuit has recognized outside the context of class actions that plaintiffs cannot satisfy Section 1291's finality requirement simply by risking dismissal of their claims if unsuccessful on appeal. In *Cheng v. Commissioner*, 878 F.2d 306 (9th Cir. 1989), after the district court entered partial summary judgment against the petitioner, he stipulated to the dismissal of his remaining claims—on the condition they would spring back to life if he successfully challenged the partial summary judgment on appeal. The Ninth Circuit held petitioner's "willing[ness] to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment)" was "insufficient" to create a final judgment. *Id.* at 310-11. As the Sixth Circuit put it in an equivalent ruling, "finality either exists at the time an appellate court decides the appeal or it does not. . . . If the possibility of finality alone establishes finality, the word has no meaning, and § 1291 serves little purpose." *Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 662 (6th Cir. 2013) (Sutton, J.). This principle must apply equally to plaintiffs in class actions.

3. Respondents' voluntary dismissal tactic is not only functionally identical to the death-knell doctrine, it also presents all three jurisprudential pitfalls this Court identified in *Livesay*.

a. Just as the "death knell" doctrine threatened to generate "multiple appeals in every complex case," *Livesay*, 437 U.S. at 474, the voluntary dismissal tactic virtually guarantees piecemeal appellate review. If anything, it promises to generate *more* interruptive appeals mid-way through cases than the death-knell doctrine did. The death-knell doctrine at

least required plaintiffs to persuade judges that the class certification denial genuinely made proceeding on their individual claims economically imprudent. *See Livesay*, 437 U.S. at 473. By contrast, the voluntary dismissal tactic lets plaintiffs choose *entirely for themselves* when they would like to take an interlocutory appeal from a class certification denial, without regard to whether the value of their individual claims in relation to their resources and the probable cost of the litigation would really keep them from pursuing those claims. *Id.* at 466. So long as they are willing to risk losing their claims if unsuccessful on appeal—a risk they would readily take, for example, if they lack confidence in their substantive claims and hope to avoid a trial—plaintiffs may employ the tactic to force immediate review. And experience shows many will be willing to take this risk.[7]

One need look no further than this case to appreciate how the voluntary dismissal tactic

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[7] As courts have noted, plaintiffs' counsel sometimes hear "a bell that is not tolling." *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *see also Weingartner v. Union Oil Co.*, 431 F.2d 26, 29 (9th Cir. 1970) (rejecting plaintiffs' argument that denial of class certification sounded death knell when individual claims were worth $353,700 if they prevailed at trial). Therefore, as one plaintiffs' class action law firm recently explained, "[i]f the sleight-of-hand employed here is permitted, . . . plaintiffs represented by experienced class action counsel would have a vehicle to evade merits litigation and obtain an immediate appeal even though counsel has the resources to prosecute the case to the true final judgment that the rules require." Pet. for Cert. at 23, *Milberg LLP v. Bobbitt*, No. 15-734.

undermines Section 1291's goal of minimizing piecemeal litigation. After asserting jurisdiction of this appeal, the Ninth Circuit noted "Microsoft makes several arguments" besides the one adopted by the district court "to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a.[8] But the Ninth Circuit considered only one of those arguments, ultimately "express[ing] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a; *see also Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1069, 1072 n.5 (9th Cir. 2015), *cert. pending* (No. 15-734) (same).

As a result, the Ninth Circuit has left the district court free to deny class certification yet again on remand. If that occurs—as Microsoft believes it should—respondents may voluntarily dismiss again

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[8] To take but one example, the Xbox 360 warranty promised the console "under normal use and service" would "substantially conform to the printed user instruction materials," CA9 ER 544, and those materials warned users not to move or tilt the console with a disc in the drive "[t]o avoid jamming the disc drive and damaging discs," CA9 ER 106, 273, 278. Microsoft submitted evidence that "to scratch a game disc, someone must directly move the console, intentionally or otherwise, while the disc is spinning, with movements that are well beyond what would be expected [during normal use]." CA9 ER 159. Individual proof is therefore necessary to determine whether Microsoft breached this warranty as to any particular console owner, i.e., whether the console failed to conform to instruction materials under normal use, especially given evidence showing only 0.4% of Xbox users reported scratched discs.

and force yet another appeal rather than test their claims on the merits. If the Ninth Circuit reverses again, that process could repeat itself—and continue to repeat indefinitely. This potentially endless cycle would enshrine piecemeal appeals as a "serious" threat in every putative class action. *Livesay*, 437 U.S. at 474. Far better to require plaintiffs, if they wish, to make a complete record concerning all of the "factual and legal issues" enmeshed in the question of class certification and then, if necessary, take a unified appeal from a final judgment on the merits of their claims, as *Livesay* mandates. *Id.* at 469 (quotation marks and citation omitted).

This case likewise illustrates how plaintiffs—if permitted to do so—will force piecemeal appellate litigation even when they have ample financial incentives to take their individual claims to trial on the merits. Respondents alleged state consumer protection claims that offered the possibility of not only actual damages but also attorneys' fees and penalties.[9] Such statutory "provision[s] for the award

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[9] *See* J.A. 58 ¶ 130 (citing CAL. CIV. CODE § 1780, which allows "[a]ctual damages," "punitive damages," and "court costs and attorney's fees"); J.A. 59 ¶ 139 (invoking 815 ILL. COMP. STAT. 505/10a, which allows "actual economic damages or any other relief which the court deems proper," including punitive damages, and "attorney's fees and costs"); J.A. 61-62 ¶ 154 (citing MICH. COMP. LAWS § 445.911, which allows "actual damages . . . together with reasonable attorneys' fees"); J.A. 67 ¶ 175 (citing N. Y. GEN. BUS. LAW § 349, allowing recovery of "actual damages," trebling "up to one thousand dollars," and "attorney's fees"); J.A. 69 ¶ 190 (citing REV. CODE WASH. § 19.86.090, which allows recovery of "actual damages," "costs . . . including a reasonable attorney's fee," and treble damages).

of attorney's fees and costs to successful plaintiffs eliminate[d] any potential financial bar to pursuing individual claims." *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002); *accord Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 375 (E.D. La. 1997). Yet respondents still refused to pursue their claims on the merits without immediate review of the class certification issue.

b. The voluntary dismissal tactic similarly frustrates Section 1291's goal of "efficient administration of justice in the federal courts." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-68 (1994). District courts are designed to build records and winnow the questions a case presents. In the crucible of trial-court litigation, many issues that appear pressing at the outset of a case become non-dispositive or even irrelevant "after a long trial on the merits." *Id.* at 872.

This is particularly so in class actions, where a plaintiff brings "two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980). More now than ever, the latter claim—propriety of class certification—can raise difficult and hotly contested issues. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As a result, a class certification denial may turn on complex factual and legal determinations. But if named plaintiffs thereafter litigate their individual claims to conclusion and lose on the merits, even the most

intricate issues associated with class status become irrelevant—and therefore unnecessary for any appellate court to consider.

The death-knell doctrine deprived appellate courts of the ability to allow litigation to run its course in this manner, thereby disrupting "the appropriate relationship" between district and appellate courts. *Livesay*, 437 U.S. at 476. The voluntary dismissal tactic would have precisely the same effect, mandating appellate review of procedural orders whose correctness might never even matter. This Court should not foist such an unwarranted and burdensome obligation upon the already busy courts of appeals.

c. Like the death-knell doctrine, the voluntary dismissal tactic gives plaintiffs an unfair advantage in class actions. Just as plaintiffs worry a denial of class certification will sound the death knell for their case, "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase a defendant's potential damages liability and litigation costs that [the defendant] may find it economically prudent to settle and to abandon a meritorious defense." *Livesay*, 437 U.S. at 476; *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."). Yet just like the death-knell doctrine, the voluntary dismissal tactic ignores the symmetrical impacts of class certification decisions and "operates only in favor of plaintiffs." *Livesay*, 437 U.S. at 476. This one-way ratchet

distorts litigation and settlement incentives in these high-stakes cases.

B. The Voluntary Dismissal Tactic Would Thwart The Discretionary Review Process This Court Created In Fed. R. Civ. P. 23(f).

1. In construing Section 1291, this Court also has considered the degree to which "[e]ffective appellate review" of the type of order at issue "can be had by other means," *Mohawk Indus.*, 558 U.S. at 114, and whether allowing an appeal as of right would "circumvent[]"those means, *Livesay*, 437 U.S. at 475. In *Mohawk Industries*, for example, the defendant argued that orders finding communications unprotected under the attorney-client privilege should be deemed "final" under Section 1291's collateral-order doctrine. This Court rejected the argument, emphasizing that litigants already had other "established mechanisms for appellate review" of such orders. *Id.* at 112. Most notably, 28 U.S.C. § 1292(b) allows courts of appeals to review pretrial orders when they involve "a controlling question of law" that is reasonably debatable and whose prompt resolution "may materially advance the ultimate termination of the litigation." Even though those mechanisms are purely discretionary, their existence counseled a "narrow" reading of Section 1291 because they go "a long way toward" alleviating any concern that, absent a broader construction of the statute's finality requirement, "consequential" or otherwise "serious errors" would not be "promptly correct[ed]." *Mohawk Indus.*, 558 U.S. at 111-12.

Likewise, in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), this Court noted

that the statutory "safety valve" in Section 1292(b) would enable appellate courts immediately to review orders of the sort at issue (orders refusing to enforce settlement agreements) when "serious" enough to take them "out of the ordinary run." *Id.* at 883. This statutory authority is "not a panacea." *Id.* at 883 n.9. But "allowing courts to consider the merits of individual claims," this Court explained, is nevertheless a "better vehicle" for effective appellate review than "the blunt, categorical instrument" of Section 1291—because the latter would have swelled appellate dockets with challenges to mundane applications of settled law, many of which will wash out if litigation in the trial court were required to run its full course. *Id.* at 883.

This Court's rulemaking power under 28 U.S.C. § 1292(e) similarly bears on whether an order is reviewable under Section 1291. Section 1292(e) allows this Court, with the subsequent approval of Congress, "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided under [Section 1292(b)]." As a structural matter, this power "counsel[s] resistance to expansion of appellate jurisdiction" in a manner that can be addressed through rulemaking authority. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995); *see also Mohawk Indus.*, 558 U.S. at 113-14 (reiterating this cautionary note); *id.* at 114-19 (Thomas, J., concurring in part and concurring in the judgment) (same in even stronger terms).

Indeed, "the rulemaking process has important virtues. It draws on the collective experience of the bench and bar, *see* 28 U.S.C. § 2073, and it facilitates the adoption of measured, practical solutions."

Mohawk Indus., 558 U.S. at 114. In contrast to finding mandatory jurisdiction under Section 1291, this Court's rulemaking power also enables the creation of systems of *discretionary* review, enabling appellate courts to maintain control over their dockets. This Court, therefore, should hesitate to allow an "immediate appeal" as of right when a rulemaking, "with the opportunity for full airing it provides," offers a more finely tuned path to review the type of order at issue. *Id.*

2. Against this backdrop, the Ninth Circuit's expansion of Section 1291 here is even less justifiable than the enlargements this Court rejected in *Mohawk Industries*, *Digital Equipment*, and *Swint*. As noted above, a litigant invoking Section 1292(b) as a route to appellate review must first persuade a district court to certify that the order satisfies the statute's "controlling question of law" and material advancement requirements. 28 U.S.C. § 1292(b). This certification authority "is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare." *Camacho v. Puerto Rico Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004); *accord Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996); *Armstrong v. Marin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998).

By contrast, Rule 23(f)—promulgated after *Livesay* under this Court's Section 1292(e) authority—enables plaintiffs in putative class actions to bypass Section 1292(b)'s requirement of district court certification. Under Fed. R. Civ. 23(f), a named plaintiff may petition a court of appeals directly to grant discretionary, interlocutory review of a class certification denial for *any* reason—including that

her "individual claim . . . standing alone, is far smaller than the costs of litigation." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. In other words, Rule 23(f) addresses the exact situation respondents claimed to face here, i.e., where "[t]he small size of Plaintiffs' claims makes it economically irrational to bear the cost of litigating this case to final judgment." J.A. 118 (Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17). And plaintiffs in this situation regularly use the innovation of Rule 23(f) to their advantage, securing interlocutory appeals over twenty percent of the time.[10]

At the same time, the Advisory Committee specifically considered and rejected a proposal that would have allowed appeals as of right from class certification decisions, concluding "it would lead to abuse." Advisory Committee on Civil Rules, Minutes (Nov. 9, 1995). The Committee explained that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f) advisory committee's

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[10] *See* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 290 Table 1 (2008) (22% of plaintiffs' petitions granted from 1998 to 2006); John Beisner, et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014) (20.5% of plaintiffs' petitions granted from 2006 through 2013), https://www.skadden.com/sites/default/files/publications/Study_Reveals_US_Courts_of%20Appeal_Are_Less_Receptive_to_Reviewing_Class_Certification_Rulings.pdf.

note to 1998 amendment. And it bears remembering that a district court's order denying class certification is "inherently tentative"; it may always be "altered or amended at any time before the decision on the merits." *Livesay*, 437 U.S. at 469 n.11 (quotation marks and citation omitted); *see also* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before judgment."). Under these circumstances, litigants should not be permitted to "thrust[] appellate courts indiscriminately into the trial process." *Livesay*, 437 U.S. at 476; *see also Cohen*, 337 U.S. at 546 (federal law "disallow[s] appeal from any decision which is tentative, informal or incomplete").

Allowing plaintiffs to force appellate courts to review orders denying class certification by voluntarily dismissing their cases would license plaintiffs to sidestep Rule 23(f)'s carefully crafted compromise. Indeed, as this case vividly illustrates, the voluntary dismissal tactic would enable plaintiffs to force appellate courts to hear the very appeals they just turned down. This would render the judicial discretion conferred in Rule 23(f) an empty promise.

In sum, named plaintiffs in putative class actions wishing to challenge class certification rulings must use the tool this Court and Congress provided all parties: discretionary review under Rule 23(f). Where, as here, the court of appeals denies permission to appeal, plaintiffs must do the same as what defendants must: litigate their claims on the merits. At the conclusion of that litigation, no matter the outcome, plaintiffs will have a final judgment from which to appeal.

II. Article III's Mootness Doctrine Also Bars Appellate Jurisdiction Under These Circumstances.

Respondents' voluntary dismissal may be deemed final only if it unconditionally terminates their merits claims, precluding them from springing back to life. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 200 & n.4 (1988) (dismissal at plaintiffs' request "prevented [them] from reviving their claims"). In that event, however, the case is moot.

1. Article III's "case or controversy" requirement demands plaintiffs maintain a "personal stake" in the litigation, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990), remaining "adverse" to the defendants "at all stages of review, not merely at the time the complaint is filed," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). A case therefore "becomes moot"—and "no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). "Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans*, 520 U.S. at 68 n.22 (1997) (internal quotation marks and citation omitted)).

Alternately stated, "Article III denies federal [appellate] courts the power to decide questions that cannot affect the rights of litigants in the case before

them." *Lewis*, 494 U.S. at 477 (internal quotation marks omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiff's particular legal rights.'" *Already*, 133 S. Ct. at 727 (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

In light of these principles, it has long been a "familiar rule that a plaintiff who has voluntarily dismissed his complaint may not [appeal from that dismissal]." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958); *see also Central Trans. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 39 (1891) ("[A] plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error."); *Kelly v. Great Atl. & Pac. Tea Co.*, 86 F.2d 296, 297 (4th Cir. 1936) ("[I]t is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit."). Even when a voluntary dismissal could be said to generate a "final" judgment, it is "entered at the request of plaintiff, and he may not, after causing the order to be entered, complain of it on appeal." *Kelly*, 86 F.2d at 297. The voluntary dismissal order strips the plaintiff of any stake in the lawsuit, making the case moot.

A pair of cases decided two hundred years ago illustrates the sturdiness of this rule. In *United States v. Evans*, 9 U.S. (5 Cranch) 280 (1809), the trial court "rejected certain testimony which was offered by the attorney for the United States." *Id.* at 280. Rather than continue to litigate, the Government "became *nonsuit*"—that is, voluntarily dismissed the case. *Id.* When the Government

sought review of the trial court's evidentiary order, this Court refused to entertain the appeal. *See id.* at 281. Similarly, in *Evans v. Phillips*, 17 U.S. (4 Wheat.) 73, 74 (1817), the plaintiff, "having submitted to a nonsuit in the circuit court," sought to take an appeal. This Court granted the defendant's motion to dismiss "upon the ground, that the plaintiff had submitted to a nonsuit in the court below, upon which no writ of error will lie." *Id.* at 73.

This Court has not had any recent need to apply the rule barring appellate jurisdiction when plaintiffs dismiss their cases, but the courts of appeals continue to enforce it. For instance, in *Druhan v. American Mutual Life*, 166 F.3d 1324 (11th Cir. 1999), the district court denied the plaintiff's motion to remand to state court. The plaintiff then voluntarily dismissed her case with prejudice and appealed to challenge the order denying her request for remand. The Eleventh Circuit held "it is clear that we have no jurisdiction" over the appeal because "the required adverseness is lacking." *Id.* at 1326. "Neither party contends that the district court erred in entering final judgment for the defendant—the plaintiff specifically requested it, and the defendant (understandably) is not complaining." *Id.* Similar cases populate the appellate landscape. *See, e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99-100 (4th Cir. 2011); *Laczay v. Ross Adhesives*, 855 F.2d 351, 355 (6th Cir. 1988); *Bowers v. St. Louis S.W. Ry. Co.*, 668 F.2d 369, 369-70 (8th Cir. 1981).

2. The Ninth Circuit has pushed aside this straightforward rule. While acknowledging "a final judgment must be adverse to a party in order to be appealable," the court of appeals concluded in the

decision it applied here that a plaintiff's voluntary "dismissal with prejudice does not destroy the adversity in that judgment." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1064-65 (9th Cir. 2014); *accord* Pet. App. 11a-12a.

The Ninth Circuit is mistaken. The only circumstance in which a plaintiff's voluntary dismissal may preserve adversity is when a prior order effectively decides the plaintiff's claim on the merits—rendering the dismissal nothing more than a formal embodiment of the plaintiff's loss and a ministerial step on the way to an inevitable appeal. In *Procter & Gamble*, for example, the district court ordered the plaintiff in a civil antitrust case (the Government), on pain of dismissal, to produce a grand jury transcript to the defense. 356 U.S. at 679. The Government responded by asking the court to go ahead and dismiss the case. "When the Government proposed dismissal for failure to obey, *it had lost on the merits* and was only seeking an expeditious review." 356 U.S. at 680-81 (emphasis added). In other words, like the plaintiff in an earlier case, the Government "did not consent to a judgment against [it], but only that, if there was to be such a judgment, it should be in final form instead of interlocutory." *Id.* at 681 (quoting *Thomsen v. Cayser*, 243 U.S. 66, 83 (1917)).

In light of this Court's careful explanations in these cases, appellate courts outside the Ninth Circuit recognize that Article III permits an appeal from a voluntary dismissal only when the district court has entered a contested court ruling adverse to the plaintiff that is "case dispositive" "as to the merits of the plaintiff's claims." *OFS Fitel, LLC v.*

Epstein, Becker & Green, P.C., 549 F.3d 1344, 1356-58 (11th Cir. 2008). Even the Sixth Circuit's *Laczay* decision, which the Ninth Circuit claimed supports its holding in *Berger*, 741 F.3d at 1065, stresses that a plaintiff may not appeal after voluntarily dismissing his claims if "it cannot be said with certainty that the plaintiff had finally lost on the merits" once the district court entered the order he wishes to attack, *Laczay*, 855 F.2d at 355. "The basic requirement for appealability of a consent judgment is that the one proposing or soliciting it shall have 'lost on the merits.'" *Id.* (quoting *Procter & Gamble*, 356 U.S. at 681).

That merits prerequisite is not satisfied here. As this Court has explained many times, an order denying class certification "in no way touch[es] the merits of [a plaintiff's] claim but only relate[s] to pretrial procedures." *Gardner v. Westinghouse Broad. Co*, 437 U.S. 478, 482 (1978); *see also id.* at 480-81 (denial of class certification "d[oes] not affect the merits of petitioner's own claim"); *Moses H. Cone Mem. Hosp. v. Mercury Const.*, 460 U.S. 1, 10 n.11 (1983) (denial of class certification has "no *legal* effect on the named plaintiff's ability to proceed with his individual claim"). The named plaintiffs remain entirely "free to "proceed on [their] individual claim[s]." *Livesay*, 437 U.S. at 467. Accordingly, the class certification denial here left the respondents' own claims fully intact. To the extent their voluntary dismissal of those unlitigated claims remains binding regardless of the outcome of the appeal, the dismissal mooted the case, stripping it of the adversity necessary to support an appeal.

3. Respondents have always limited their alleged "personal stake" in this appeal to their own individual claims. BIO 16 n.4. They have never contended a "case or controversy" exists based on any relationship they have to the class they sought to represent. So they have "forfeited" any right to make any argument now predicated on their proposed class representation. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). At any rate, any such argument would fail as well.

In certain circumstances, plaintiffs seeking to represent classes whose claims are resolved retain standing to appeal class certification denials. Specifically, when named plaintiffs' claims are mooted "without their consent," they retain a personal stake in class certification sufficient to support an appeal from a denial of that request. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *Geraghty*, 445 U.S. at 402. In that situation, the class certification issue determines whether the named plaintiffs may recover attorney's fees and costs by "allocating such costs among all members of the class who benefit from the recovery." *Roper*, 445 U.S. at 333, 338 n.9; *see also Geraghty*, 445 U.S. at 401 ("Geraghty's 'personal stake' in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*."). This Court has also suggested that a named plaintiff who has sought class certification "must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald*, 136 S. Ct. at 672. So if events beyond the plaintiff's control preclude that, "an appeal lies from the denial [of class certification] and [a reversal] 'relates back' to the

date of the original denial." *Geraghty*, 445 U.S. at 404 n.11.

This Court has since indicated that some of this reasoning might no longer be valid. *See Symczyk*, 133 S. Ct. at 1532 n.5; *see also Campbell-Ewald*, 136 S. Ct. at 679 n.1 (Roberts, C.J., dissenting). But there is no need to revisit *Roper* or *Geraghty* here. The continuing vitality of those cases has no bearing on the legitimacy of the voluntary dismissal tactic.

Respondents voluntarily dismissed their individual claims without obtaining any relief, so they have no argument for spreading attorney's fees or costs. *See Boeing Co. v. Gemert*, 444 U.S. 472, 478 (1980) (only a "successful litigant" may seek to spread fees or costs). And *Geraghty*'s "relation back doctrine," even in its strongest form, "comes into play only when a court confronts a jurisdictional gap—an individual claim becoming moot before the court can certify a representative action." *Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting). Here, respondents' claims were not mooted against their will or even by happenstance. Respondents were free to litigate their individual claims to conclusion and then, if successful, seek "effective review [of the denial of class certification] after final judgment." *Livesay*, 434 U.S. at 469. But they chose to forego that opportunity, declining to prosecute their claims and asking for entry of judgment against them. Pet. App. 35a-39a. Having done so, respondents no longer have a personal stake in the outcome of this litigation.

Roper and *Geraghty*, in short, are designed to ensure "sound judicial administration" and prevent defendants or the mere passage of time from thwarting potentially meritorious class actions.

Roper, 445 U.S. at 339. But here, it is the *plaintiffs* who are engaged in gamesmanship, inviting piecemeal appeals and triggering the needless expenditure of judicial resources. No policy or rule counsels abandoning traditional mootness principles to enable this appeal.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand with instructions to dismiss the appeal.

Respectfully submitted,

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